83-740

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED INC., et al.,
Petitioners,

v.

ROGER M. BALDWIN, District Engineer, United States Corps of Engineers, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Are not challengers to an administrative agency decision based on an ex parte informal self-designated "record" entitled to introduce evidence in the District Court to prove their well-pleaded allegations that the agency has acted arbitarily and capriciously in violation of the Administrative Procedure Act, and has failed to include all relevant material in the "record"?

2. Must not the Corps of Engineers, in authorizing a project intruding on a National Historic Landmark comply with a 1980 Congressional mandate to take maximum possible action to minimize harm to a National Historic Landmark, 16 U.S.C. §470h-2(f), rather than relying on the action of another agency which admittedly failed to perform that statutory function?

LIST OF PARTIES

DEL-AWARE UNLIMITED, INC.; VAL SIGSTEDT, COLLEEN WELLS; MARC SADOUX; MARION W. MASLAND; TOWNSHIP OF BRISTOL; NORMAN AND DIANE TORKELSON; THE PHILADELPHIA FEDERATION OF SPORTSMEN'S CLUBS; CHARLES GILMORE; MARY ELLEN NOBLE; THE PENNSYLVANIA STATE FEDERATION OF SPORTSMEN'S CLUBS; HONORABLE RITA C. BANNING; WATERSHED ASSOCIATION OF THE DEL-AWARE RIVER; HONORABLE JAMES C. GREENWOOD; HONORABLE CARL FONASH,

Appellants

v.

ROGER M. BALDWIN, individually, and as District Engineer, U.S. Army Corps of Engineers; ALEXANDER ALDRICH, individually, and as Chairman of the Advisory Council on Historic Preservation; WILLIAM GORDON, individually, and as Assistant Secretary, U.S. Department of Commerce; GERALD HANSLER, individually, and as Executive Director, the Delaware River Basin Commission; HAROLD DENTON, individually, and as Director, Division of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission; THE NUCLEAR REGULATORY COMMISSION; THE HONORABLE PETER DUNCAN, as Secretary Of The Department of Environmental Resources of the Commonwealth of Pennsylvania; NESHAMINY WATER RESOURCES AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY,

Appellees

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STATEMENT OF JURISDICTION

This is a petition for review of a Judgment Order entered July 5, 1983 by the Court of Appeals for the Third Circuit in Del-AWARE Unlimited, Inc., et al. v. Roger M. Baldwin et al., Civil No. 83-1010, affirming without opinion an Order entered December 17, 1982 in the District Court for the Eastern District of Pennsylvania in Del-AWARE Unlimited Inc., et al. v. Roger M. Baldwin et al., Civil No. 82-5115, denying plaintiffs' Motion for Preliminary Injunction. A timely filed Petition for Rehearing was denied on August 2, 1983. Jurisdiction is conferred by 28 U.S.C. §2101(c).

STATEMENT OF FACTS

The issues in this petition for review arise under the Administrative Procedure Act, 5 U.S.C. §551 et seq., the National Environmental Policy Act, 42

U.S.C. §4431 et seq. and Section 110(f) of the National Historic Preservation Act, 16 U.S.C. §470h-2(f).[1/]

Plaintiffs allege arbitrary and capricious action by the Army Corps of Engineers in issuing permits for the Point Pleasant pumping station, one component of the Point Pleasant Water Diversion Project, without preparing an Environmental Impact Statement. The project was conceived in the 1960's to divert up to 150 million gallons of water per day from the Delaware River. The water was to be used as supplemental cooling water at the proposed Limerick Nuclear Power Plant located thirty miles away on the Schuylkill River in Limerick, Pennsylvania, and to supplement public drinking water supplies in Bucks and

1/ The text of these provisions is set forth in the Appendix hereto.

Montgomery Counties in Pennsylvania. The project, as originally conceived, has been scaled down significantly due to changes in population and need projections to 95 mgd[2/]

The primary project proponents are defendant Philadelphia Electric Company (PECo), the intended user of approximately half the water, and defendant Neshaminy Water Resources Authority (NWRA) a municipal authority created by Bucks County inter alia, to pump and treat the water.

2/ Most recently, while the appeal was pending in the Third Circuit, the reasonably anticipatable need of PECo for the supplemental cooling water portion of the water was cut in half by the Pennsylvania Supreme Court in Pennsylvania Public Utility Commission v. Philadelphia Electric Company, 460 A.2d 734 (Pa. 1983), sustaining a Pennsylvania Public Utilities Commission decision ordering PECo to cancel or suspend one half of its project. Equally significantly, on May 17, 1983 in a Bucks County nonbinding referendum which its Commissioners have agreed to enforce, the voters mandated that the project be abandoned, and as a (Footnote continues on next page)

The pumping station is now under construction in the picturesque and historically significant village of Point Pleasant, prehistorically an important point of ferry crossing over the Delaware River, where the Delaware Canal is also located. The Canal has been designated as a National Historic Landmark, the highest form of designation under the National Register System. Point Pleasant contains significant archeological resources, and is a favorite spot along the Delaware River for fishing, tubing, and other recreational activities. Lower Black's Eddy, where the water intake is proposed to be located, is a spawning and nursery area for American Shad, denominated a major fishery resource by the

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(Continuing footnote from previous page)
2/ result, the Bucks County Commissioners have taken numerous actions to halt the project. These efforts, so far only partially successful, are continuing as construction of the segment at issue herein also continues.

Commonwealth of Pennsylvania, 30 P.S. §431.

The proposed pump station for which the Corps issued its permits consists of a intake structure composed of two 70 foot rows of screens and piping connected by three 300 foot long, 42 inch diameter conduits extending back into the river banks. The conduit would then combine and cross under the Delaware Canal and enter a pumphouse facility which would be elevated 65 feet, serviced by outdoor transformers located about 20 yards from the Canal. The water would be pumped through a transmission main up a steep hillside to a proposed Reservoir located some 2.4 miles away.

Segments of the project excluded from consideration by the Corps in its permit review and approval include the transmission main, the reservoir, the drinking water treatment plant (for which a separate permit was issued by the

Corps), and the ultimate uses.

Various aspects of the project were studied by different agencies over the past fifteen years, and many of the required permits for different components have been issued, over the continuous opposition of the relevant fisheries agencies.[3/] However, other necessary elements of the proposed system are still in the initial planning and permitting stages. A construction permit, but not a operating permit, has been issued for Limerick.

The project was endorsed in a forty-four page Environmental Impact Statement (EIS) prepared by the Delaware River Basin Commission in 1973. Subsequently, in August, 1980, the DRBC prepared a supplemental Environmental

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3/ Appeals from Pennsylvania Department of Environmental Resources permits are pending before the Environmental Hearing Board as 83-177-H et al.

Assessment (EA) and later gave the project another approval, while deferring historical review to the Corps of Engineers, and other aspects to the Pennsylvania P.U.C. and the NRC. This decision was challenged by groups and individuals, virtually all different than the present plaintiffs, in Delaware Water Emergency Group et al. v. Hansler et al., 536 F.Supp. 26 (E.D. Pa. 1981) aff'd per curiam, 681 F.2d 805 (3d Cir. 1982)[4/], (DELWEG).

In the DELWEG case, the DRBC argued that its 1981 decision was not final in that the NRC and the Corps of Engineers had not yet exercised their regulatory powers of review. The distirct court, accepting this argument, noted that the project would likely be

4/ Limerick had also been the subject of a challenge, in Environmental Coalition of Nuclear Power v. Nuclear Regulatory Commission, No. 75-1421 (3d Cir., Nov. 12, 1975) (Judgment Order).

the subject of two additional Environmental Impact Statements, one by the NRC and one by the Corps. DELWEG, supra, 536 F.Supp. at 46-47. The DRBC ahd also indicated that it could reopen its docket decision at any time, if significant new issues or circumstances come to light. Based partly on this understanding, the Court refused to require a further Impact Statement from the DRBC.[5/]

The project never received the further in-depth environmental review predicted to and envisioned by the district court at the time the DELWEG decision was handed down. Despite its earlier assurances, the NRC has declined to address the issue of the project's adverse water quality impacts on the

5/ Plaintiffs herein filed a Petition to Reopen, in September, 1982, which the DRBC, after this action was instituted, denied. That action is one of the agency actions challenged in this proceeding, but is not part of this appeal.

Delaware River, claiming that that issue was finally settled by the DRBC. This issue is the subject of a pending administrative proceeding which the district court deemed not yet ripe for review, (Application of Philadelphia Electric Company, No. 50-352, 50-353 (NRC ALSB).

On October 25, 1982 the Corps concluded that no EIS for the project as a whole or any segment was necessary, and issued a segmented Section 404 Clean Water Act and Section 10 Rivers & Harbors Act permit for the intake and Delaware Canal crossing, and Point Pleasant pump station on the basis of a twenty page, conclusory Environmental Assessment. It concluded that no significant environmental effects would occur, and adopted virtually wholesale the findings of other agencies which had not even purported to deal with some of the issues and failed to provide any independent analysis of

most environmental impacts. Objections of U.S. Fish & Wildlife Service and Pennsylvania Fish Commission were swept away by ignoring them or misstating their role. Fish & Wildlife's concern regarding cumulative effcts of this and other proposed withdrawals on water quality and fish was dismissed with the claim that the diversion could be stopped by the flick of a switch. No independent consideration of alternatives was given, contrary to the requirements of NEPA, 42 U.S.C. §4332(E).

In one utterly transparent evasion of its responsibility, the Corps stated that the DRBC decision foreclosed any duty to find a minimally intrusive crossing location across the Delaware Canal, a Historic Landmark, for the pump station despite the requirements of the National Historic Preservation Act, compliance with which the DRBC had

specifically delegated to the Corps in an exchange of letters in July, 1980 and January, 1981. There the Corps took responsibility for ensuring that the historic resources of Point Pleasant would be adequately protected through compliance with the Historic Preservation Act.

An amendment to that Act enacted in December, 1980, Section 110(f), 16 U.S.C. §470h-2(f), after the DRBC had completed its review, imposed a heightened requirement on federal permitting agencies to undertake "to the maximum extent possible. . . such planning and action as may be necessary to minimize harm" to National Historic Landmarks. The Corps proclaimed that the DRBC's prior determination was dispositive notwithstanding the specific delegation of authority to the Corps, and notwithstanding the fact that the DRBC

review had been conducted prior to the enactment of Section 110(f).

This suit was filed on November 17, 1982, alleging that the Corps, DRBC, and NRC, violated of, inter alia, the National Environmental Policy Act, 42 U.S.C. §4332, et seq., Fish and Wildlife Coordination Act, 16 U.S.C. §661 et seq., National Historic Preservation Act, 16 U.S.C. §470 et seq. and the Administrative Procedure Act, 5 U.S.C. §706.

Plaintiffs filed a motion for preliminary injunction to enjoin the commencement of construction set for January 1, 1983. Plaintiffs alleged inter alia, that the Corps ignored relevant factors, acted arbitrarily and capriciously, failed and refused to coordinate with the relevant fisheries agencies, had predetermined the outcome of its review, made only paper compliance with the historic statute, and refused to consider other relevant aspects and

impact of the project, and alterntives in determining not to prepare an EIS or to require a less damaging location for the crossing.

The Court scheduled a hearing on the Motion, but later limited the proceedings almost entirely to argument of counsel based on the documents which were proferred by defendant Corps on November 30th, as its "administrative record". This was a two-carton set of miscellaneous documents selected and produced from the Corps' files, consisting mostly of reports favorable to the project and omitting some of the documents which challenged or undermined the favorable view. It also contained hundreds of pages of public hearing transcript and letters of opposition from Bucks County citizens.

The DRBC "record" produced during the proceedings was approximately

fifty pages long, consisting entirely of the official DRBC public record, and included none of the memoranda, studies, correspondence or communications underlying the DRBC's refusal to reopen its decision. Other defendants filed no record.

At the request of defendants, appellants filed a detailed trial plan including the names of some nineteen proferred witnesses, and listed some sixty-three exhibits thought not to be in the Corps' self-selected record, including memoranda by or of Corps personnel indicating their predisposition, as well as arbitrary action.

However, on November 30th, the Court ruled plaintiffs could not produce any witnesses except at the discretion of the court, if the court determined that it needed testimony to "educate" it (A164-169). However, the Court made that

determination wholly on the basis of the information actually contained in the record and the argument of counsel. Plaintiffs were not permitted to introduce extra-record evidence or testimony, with the exception of one witness, who was permitted to testify for one hour, to challenge or rebut the information contained in the two agency "records" and a few documents not objected to by defendants. Hence, plaintiffs were denied the right to prove evidentiary facts not contained within the self-selected ex parte administrative records which they alleged would prove that significant environmental impacts had been ignored or swept under the rug.

The motion for preliminary injunction was denied in a decision issued from the bench on December 15, 1982. Consistent with its evidentiary approach, the Court held that based "on

the record" before it, plaintiffs had failed to show that the Corps had acted arbitarily or capriciously, or had failed to disclose significant effects, or to consider alternatives, or consult with the fish agencies (A21, 22, 26).

I. THE THIRD CIRCUIT'S DOCTRINE DENYING CHALLENGERS OF INFORMAL AGENCY DECISIONS THE RIGHT TO INTRODUCE EVIDENCE IS INCONSISTENT WITH THE INTENT OF THE ADMINISTRATIVE PROCEDURE ACT, THE DECISIONS OF THIS COURT, AND THE LAW OF OTHER CIRCUITS

This case presents the Court with an increasingly severe problem last addressed directly in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1970) and Camp v. Pitts, 411 U.S. 138 (1973), i.e., the right of challengers to an informal ex parte administrative action in a specific case to present evidence, including witnesses and documents, to prove well-pleaded allegations of arbitrary and capricious agency action violating the standards of Section 10(e)

of the Administrative Procedures Act, 5 U.S.C. §706(2)(A), as elaborated by this Court in Overton Park.

It brings to the Court a critical need to establish a rule, as enunciated by several Circuits, but rejected by, inter alia, the Third Circuit, that the "probing, in-depth review" required by the A.P.A., while not requiring a de novo hearing, does require that challengers be allowed to present evidence to prove their case.

It seeks this Court's determination such a right exists, as may be implied from this Court's recent decision stressing the existence of such procedures. Baltimore Gas & Electric Co. v. NRDC, ___ U.S.___, 103 S.Ct. 2246, 51 L.W. 4678 (1983). There, this Court stressed the availability of "as full a presentation as desired" before the agency in individual cases in sustaining

a general rule-making by the NRC (51 L.W., at 4683).

In Overton Park, this Court ruled that in reviewing informal agency action a court is to engage in "substantial inquiry" and "a thorough, probing, in-depth review" of informal agency action. This Court reversed the circuit court's grant of summary judgment in favor of the agency based on litigation affidavits submitted by the parties, Id at 409, without reference at all to the administrative record, and without the challengers having been afforded the opportunity for discovery of the agency administrator (401 U.S., at 409).

This Court held that litigation affidavits submitted by the agency were mere "post-hoc rationalizations" of the agency action and, as such, could not provide a basis for judicial review. (Id. at 419).

Hence, the Court remanded the case for review based "on the full administrative record" (Id. at 420), noting that extra-record evidence should be admitted by the court if necessary to enable it to effectively review the administrative record. Indeed the Court admonished the lower court that:

> "since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary. . . to require some explanation in order to determine if. . . the Secretary's action was justifiable under the applicable standard," Id. at 420.

On remand, the district court ruled that plaintiffs were "entitled to offer expert testimony to evaluate the investigation of alternative routes by the Secretary. . . [and] to show that there were in fact feasible and prudent alternative routes". Citizens to Preserve Overton Park v. Volpe, 335 F.Supp 873, 877 (W.D. Tenn. 1972). The court proceeded to conduct a

twenty-five day evidentiary hearing. (Id. at 878).

In affirming without opinion the district court's ruling that deprived plaintiffs of the right to introduce evidence, the court below has acted directly contrary to the teaching of Overton Park. Plaintiffs' "Preliminary Hearing Plan" listed 19 witnesses. Only one was allowed to testify. Critical documents which had not been included in the Corps of Engineers "administrative record", including letters and memoranda to and from the Corps, memoranda of meetings or phone calls with Corps officials, which cast doubt on the Corps' stated basis for its decision, were refused admittance except by the largesse of the court.

The district court made it clear that it proceeded on the basis that: "the court has discretion to

permit [testimony outside the administrative record] where it would tend to advance specific allegations by the plaintiffs that the administrative record is deficient" (A146). (Emphasis added) Elaborating, the court stated: "I said it may be received; I didn't say it absolutely will be received (A149); "I [will] decide whether or not testimony is necessary to educate me" (A150).

The district court's action was consistent with the Third Circuit's repeated affirmance without opinion of lower court rulings which have denied a right to introduce extra-record evidence in review of informal agency actions.[6/]

6/ E.g., Delaware Water Emergency Group et al. v. Hansler, 536 F.Supp. 26, 46 (E.D. Pa. 1981), aff'd, 681 F.2d 805 (3rd Cir. 1981); Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F.Supp. 1341 (E.D. Pa. 1978), aff'd, 578 F.2d 1375 (3d Cir. 1978); but see, Township of Springfield v. Lewis, 18 ERC 1978 (3rd Cir. 1983).

In upholding such constricted review, the Third Circuit has not only defeated the strictures of this Court under the Administrative Procedures Act, but has seriously weakened the traditional common law right to present evidence in an effort to control administrative action. Thus, in Greene v. McElroy, 360 U.S. 474 (1959) this Court stated that an aggrieved individual's right to confront and cross examine evidence supporting an agency decision is one of the "immutable [principles] in our jurisprudence", (Id at 496), and reflects "the Court's concern that the traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers", (Id at 508).

The Second, Fifth and D.C. Circuits have repeatedly followed the Overton Park rationale and held that

challengers of informal agency action "on the administrative record" have a right to introduce extra-record evidence, particularly in cases under the National Environmental Policy Act, to prove that the record itself is deficient. E.g., County of Suffolk v. Secretary of Interior, 502 F.2d 1368 (2d Cir. 1977); Izaak Walton League of America v. Marsh, 655 F.2d 346, 369, n.56 (D.C. Cir. 1981); Image of Greater San Antonio Texas v. Brown, 570 F.2d 517, (5th Cir. 1978). Other Circuits, however, have questioned challengers' right to introduce extra-record evidence.[7/]

This Court has repeatedly stated that although NEPA established

7/ E.g., Grazing Field Farms v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980); Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1028 (4th Cir. 1975) cert den. 423 U.S. 912 (1975). See also, Asarco v. E.P.A., 616 F.2d 1153 (9th Cir. 1980).

significant substantive goals for the nation, its mandate to the agencies is "essentially procedural, i.e., to ensure a fully informed and well considered decision". Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); Stryker's Bay v. Karlen, 444 U.S. 223, 227 (1979). In Kleppe v. Sierra Club, 427 U.S. 390 (1976) this Court stated:

> NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by "all practicable means, consistent with other essential considerations of national policy" [citation omitted]. Section 102(2)(C), is one of the "action - forcing" provision intended as a directive to "all agencies to assure consideration of the environmental impact of their actions in decision-making".[8/] Conference Report on

8/ Section 102(2)(C) requires a detailed statement on the environmental impact of the proposed action, including discussion of unavoidable adverse effects of the action, alternatives, short-term and long-term benefits irretrievable commitment of resources; and requires consultation with all relevant federal agencies, and inclusion of their comments with the proposal through all stages of the review process. 42 U.S.C. §4332(2)(C).

NEPA, 115 Cong. Rec. 40416 (1969) (Id. at 409). (Emphasis added)

This Court went on to state in Kleppe that it is the reviewing court's duty to ensure the fulfillment of Congress intent to assure such consideration during the agency's development of a proposal, or during its formulation of a position on a proposal submitted by private parties, Id, and that during this process the agency takes a "hard look" at all the environmental consequences. (Id. at 410, n.21) Accord, Baltimore Gas & Electric Co. v. NRDC, supra, 51 L.W. at 4678. That case, reaffirming Overton Park, stressed the Court's duty is to enforce the twin purposes of NEPA, the duty to "consider every significant aspect of the environmental impact", and to disclose them, and "that its decision is not arbitrary or capricious" (51 L.W. at 4680). The procedures governing the

rulemaking at issue there are very different from those applicable to this action by the Corps.

But if the reviewing court's task under NEPA is to determine whether the environmental consequences were fully reviewed and considered during the agency decision-making process, then for a reviewing court to prevent challengers from presenting evidence to support well-pleadings allegations that the "bare administrative record" does not reflect whether the consequences were considered and disclosed, or whether consequences were never identified, or were excluded from the record, in case of informal agency decisionmaking, defeats the purpose of this Court's holdings. Persons challenging informal agency action on a specific project, as distinguished from rulemaking or decision based on an adversary record, should be allowed

as a matter of right, to prove their case. While this is true generally under Overton Park, it is particularly important in NEPA cases.

In County of Suffolk, supra, a leading case, the Second Circuit explained that extra-record evidence is an essential means for challengers to establish that the "record" compiled by an agency under NEPA is itself deficient:

> Generally. . . allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept "stubborn problems or serious criticism under the rug" [citation omitted] raises issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an EIS [footnote citations omitted] and in suits attacking an agency determination that no such statement is necessary [footnote citations omitted]. (502 F.2d, at 1385).

In Como-Falcon Coalition, Inc. v. U.S. Department of Labor, 465 F.Supp. 850,

858, n.1, (D.Minn. 1978) mod oth gr 609 F.2d 342 (8th Cir. 1979) cert den 446 U.S. 936, this reasoning was further explicated:

> If the federal agency has overlooked or inadequately assessed a possible adverse environmental impact, it is unlikely that the deficiency will be apparent from examination of the record itself. Given the scheme of NEPA and the scrutinzing with which the judiciary must eye negative assessments of environmental impact, a reviewing court cannot be restricted to the administrative record.

See also, Sierra Club v. U.S. Corps of Engineers, 701 F.2d 1011, 1031 (2d Cir. 1983).

In a line of cases commencing with Save Our Ten Acres v. Kreger, 472 F.2d 463 (1973), the Fifth Circuit has linked the challengers' right to introduce extra-record evidence to their burden of proof, holding that once challengers have alleged facts which, if true, show that the recommended project

would materially degrade any aspect of environmental quality, the court must examine and weigh the evidence of both sides to determine whether the agency action was "reasonable".[9/] See also, Louisiana Environmental Society, Inc. v. Dole, 707 F.2d 116, 120, n.4 (5th Cir. 1983); Manatee County v. Gorsuch, 554 F.Supp. 778, 782 (M.D. Fla. 1982).

This right is even more essential where, as here, the agency has determined not to prepare an EIS and therefore has not prepared and circulated a draft EIS, which would afford the agencies and public at least an opportunity to review and comment to ensure that the agency has identified all the

9/ The district court found in this case that plaintiffs had met that initial burden (A16). Hence, under the Fifth Circuit's rule extra-record evidence would have been allowed.

effects and taken a hard looke. Baltimore Gas Co. v. NRDC, supra, 51 L.W. at 4680.

In attempting to deny challengers the right to introduce extra-record evidence to challenge informal ex parte agency action, courts in the Third and other Circuits, have acted on the basis of a misunderstanding of this Court's decisions in Camp v. Pitts, 411 U.S. 138, 142 (1973) and Vermont Yankee Nuclear Power Corp v. NRDC, 435 U.S. 519 (1978). In Philadelphia Council, supra, the district court stated that Camp v. Pitts, when read with Overton Park, "clearly mandate[s] that. . . the court. . . should confine its inquiry to the administrative record" (437 F.Supp. at 1348). This is clearly a misreading of this Court's ruling.

What this Court actually held in Camp v. Pitts was that the "focal

point for judicial review should be the administrative record already in existence" (411 U.S. at 142) (emphasis added), and not a de novo trial. It is a total distortion to read this as precluding challengers' right to introduce extra-record evidence to test that record. In Camp v. Pitts itself the Fourth Circuit had found insufficient basis in the administrative record to uphold a determination by the Comptroller of Currency. Having determined the record to be deficient, the appeals court remanded to the district court for a trial de novo, specifying that a wholly new record would be created and a decision rendered on the basis of the evidence introduced at trial (Id. at 140). This Court struck down that remand order, holding that the validity of the Comptroller's decision must be judged on the basis of "the administrative record" and that if it is

not sustainable on that basis the matter must be remanded to him. However, this determination did not preclude the reviewing court from taking additional evidence to test the administrative record. In fact, this Court stated:

> The Court of Appeals should determine whether, and to what extent, in the light of the administrative record, further explanation is necessary to a proper assessment of the agency's decision (Id. at 143) (Emphasis added).

Hence, Camp v. Pitts, by its very terms, held that a challenge to informal agency action may require the introduction of extra-record evidence. That Camp did not decide directly that challengers have a right to introduce evidence is hardly surprising, since that issue was not before the Court.

The Camp - Overton principle that a reviewing court must focus its inquiry on the administrative record rather than creating an entirely new

record should not be extended beyond its intended purpose, i.e., that the agency must justify its decision on the basis of what is found in the record. Accord, Motor Vehicle Mfrs. Ass'n. v. State Farm M.A. Ins. Co., ___ U.S.___, 103 S.Ct 2856, 2870 (1983). It does not dictate the exclusion of extra-record evidence which is offered to challenge the sufficiency of that record. As the Ninth Circuit stated in Asarco, Inc. v. U.S. E.P.A., 616 F.2d 1153 (9th Cir. 1980):

> It is both unrealistic and unwise to "straitjacket" the reviewing court with the administrative record. It will often be impossible especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all the relevant factors unless it looks outside the record to determine that matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters. Id. at 1160.

There is no reason to believe that this

Court ever intended to deprive litigants of the right to introduce extra-record evidence to show that the agency has not done its job, and it should not do so now.

Similarly, this Court's opinion in Vermont Yankee and Baltimore Gas & Electric cannot be read to deny the challengers' right to introduce extra-record evidence in an ex parte project decision. In Vermont Yankee, this Court held that the appellate court had erred in the course of reviewing the promulgation of an agency rule by imposing procedural requirements that went beyond those imposed by the Administrative Procedures Act, 5 U.S.C. §553 (435 U.S. at 525). In this context, the Court reaffirmed the Camp v. Pitts holding that the validity of the action must be tested by "the administrative record", and that the reviewing court should not "stray

beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best". Id. See, Motor Vehicle Mfrs. Ass'n. v. State Farm, supra.

Similarly, Baltimore Gas & Electric, supra involved generic rulemaking, not an individual case decision. Indeed, there, this Court stressed that the right of parties to make "as full a presentation as desired" had been preserved prior and subsequent to the challenged rule. (51 L.W., at 4683).

This Court has traditionally accorded a high degree of deference to agency rulemaking. Batterton v. Francis, 432 U.S. 416, 425, n.9 (1976). As Professor Jaffe stated, the very delegation of formal rulemaking power recognizes an area of discretion which restricts a court to the question of

whether a regulatory term is consistent with the statutory term and purpose. Jaffe, Judicial Control of Administrative Action, 564-65 (1965).

Thus, this Court's admonition to reviewing courts in Vermont Yankee not to impose their own notion of procedure into the review of agency rulemaking is primarily directed towards ensuring that the judiciary does not overstep its bounds into the quasi-legislative realm of agency rulemaking, and hence is not applicable to review of specific informal agency action. Even in the rule-making area, in Baltimore Gas & Electric, this Court in stressing the "careful consideration and disclosure required by NEPA"; noted the fact that hearing and adversary testimony were afforded prior to the NRC's action. (51 L.W., at 4681) And in Motor Vehicle Mfs. Ass'n. v. State Farm, supra, 103 S.Ct. at 2870, this Court

warned against reading Vermont Yankee, "as though it were a talisman under which any agency decision is by definition unimpeachable". (51 L.W., at 4958)

As suggested in Overton Park, and implied from Baltimore Gas & Electric, supra, the crux of the issue in the case of ex parte informal agency action is that challengers are never given an adversary forum before the agency in which to present proof and evidence for their contentions to an impartial decision-maker, nor an opportunity to review and rebut the agency's claims. Compare Baltimore Gas & Electric, supra. This situation contrasts sharply with the case where the agency itself provides a full, formal adjudicatory proceeding in which intervenors have an opportunity to present complete supporting factual evidence on their claims under NEPA and, hence, the issues can be fully fleshed

out before the agency. See, e.g., Vermont Yankee, supra, 435 U.S. at 526-27. Baltimore Gas & Electric, supra.

Where the agency gives challengers no such forum, and if they are not given a forum in court, then the supporting proof and evidence are never heard. Such a deprivation is particularly significant when, as here, the agency determines not to prepare an EIS. Where an EIS is prepared, NEPA requires circulation of a draft EIS, giving others at least the opportunity to review and rebut the agency's intended findings. Here, the Pennsylvania Fish Commission learned that the Corps erroneously believed it need not consider the Commission's opposition because it erroneously believed that another state agency spoke for the state.

Refusal to allow challengers to present evidence to prove their case

defeats this Court's mandate in Overton Park that a reviewing court must engage in a "thorough, probing, in-depth review" of agency action and deprives them of the opportunity to meet their burden of establishing a likelihood of success in proving that the agency acted arbitrarily and capriciously.

The perpetuation of this doctrine will, more broadly, seriously undermine this Court's mandate under the APA and NEPA that administrative agencies must comply with the law; it will result in agencies' decisions being by definition unimpeachable, without even a talisman. This Court's present action is required to prevent this result.

II. SECTION 110(f) OF THE NATIONAL HISTORIC PRESERVATION ACT, 16 U.S.C. §470h-2(f) REQUIRED THE CORPS TO ADOPT ACTIONS TO MINIMIZE HARM TO A NATIONAL HISTORIC LANDMARK

This case of first impression under Section 110 (f) of the National

Historic Preservation Act, 16 U.S.C. §470h-2(f), seeks to mandate compliance with the philosophy of this Court's mandate in Overton Park implementing Congress' intent to "curb the accelerating destruction of our country's natural beauty". Overton Park, supra, 401 U.S. at 404.

In December, 1980, Congress accorded a high degree of protection to National Historic Landmarks similar to that which Section 4(f) of the Department of Transportation Act, (DOTA) 49 U.S.C. §1653(f), had given to parklands and historic sites. It extended that protection, from transportation projects covered in Section 4(f) of the DOTA, to all "federal undertakings," defined to include all projects requiring federal permits.[10/]

10/ The term "undertaking", as used in Section 110(f) is defined at 16 U.S.C.
(Footnote continues on next page)

Section 110 (f) was enacted to ensure "a higher standard of care to be exercised by federal agencies when considering undertakings that may directly and adversely affect national historic landmarks", H.R. Rep. No. 96 - 1457, 96th Cong., 2d Sess. 38 (1980). Section 110(f) states:

> Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic

(Footnote from previous page)
10/ §470w(7) to mean "any action as described in [16 U.S.C. §] 470f." The actions described in 16 U.S.C. §470(f) include "undertakings which any federal department or agency has authority to license." Furthermore, Section 110(d), 16 U.S.C. §470h-2(d), provides in part that "all Federal agencies shall carry out agency programs and projects (including those under which . . . any federal license, permit or approval is required) in accordance with the purpose of Sections 470 to 470a, 470b, and 470c to 4702-6". Section 110(f) is included within these sections.

> Preservation a reasonable opportunity to comment on the undertaking. 16 U.S.C. 470h-2(f). (Emphasis added).

The Corps of Engineers failed to undertake maximum possible planning and action to protect the Delaware Canal, a National Historic Landmark, by failing to identify, consider or adopt a canal crossing location which would minimize harm to the Canal.

The Delaware Canal is a fifty-seven mile facility in the Philadelphia metropolitan area similar in appearance and character to the C&O Canal along the Potomac. Built in the 1820's, it is today a National Historic Landmark and state park, visited annually by millions for canoeing, fishing, and towpath walking, jogging, etc.[11/]

11/ On October 23, 1983, the tragic death of television reporter Jessica Savitch occurred in the Delaware Canal at New Hope, PA, some eight miles from Point Pleasant.

Point Pleasant is one of the most scenic and accessible stretches of the Canal, boasting two locks, two stream crossings, and two separate Landmark structures, and is set back from the highway in an unspoiled scenic context. The diversion project would locate a pump station elevated 65 feet above the Canal level, with exposed transformers for the pumps and parking lots facing the Canal from about twenty yards away.

Section 110(f) was enacted for the purpose of giving special protection to Landmarks such as the Delaware Canal at Point Pleasant. As this Court stated in Overton Park:

> [T]he very existence of the statute indicated that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present. . . (401 U.S. at 413).

Both the language and legislative history

of Section 110(f) indicate that it was intended to closely mirror the requirements of Section 4(f) of the DOTA, which states, in relevant part:

> [T]he secretary shall not approve any program or project which requires the use of any publicly owned land from a public park... unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park... 82 Stat. 82 4, 49 U.S.C. § 1653(f) (1964 ed., Supp. V)

Drawing upon experience with the earlier Section 4(f), the Congress substituted the requirements of "maximum. . . planning and actions" to minimize harm to the Landmark for the Section 4(f) prohibition against approving an action for which a "feasible and prudent alternative" exists.

Having thus achieved their action - forcing purpose within the overall planning, the "no prudent and feasible alternative" requirement of

Section 4(f) was deleted. However, consideration of prudent and feasible alternatives as part of maximum possible action to minimize harm was considered as a component of the requirement of the strengthened mandate to take "maximum... planning and actions... to minimize harm." The Committee Report summarized:

> Although the Committee deleted a mandatory requirement that an agency first determine that no prudent or feasible alternative to such undertaking exists, the Committee does intend for agencies to consider prudent and feasible alternatives.

H.R. Rep. No. 96-1457, at 38 (1980).

There is no dispute that the Corps did, indeed, not only wholly fail to consider alternative projects to one which would necessitate crossing the Canal, but also such actions to minimize harm as choosing any other Canal crossing locations than the one at Point Pleasant. On the contrary, the Corps asserted that Section 110(f) did not mandate even

identification, much less adoption, of minimally intrusive crossing sites and asserted, on the contrary, that the Corps was bound by the DRBC's choice of Point Pleasant for the crossing of the Delaware Canal (A132). This position was taken despite the facts that the DRBC's review had occurred prior to the passage of Section 110(f), and that DRBC had specifically delegated responsibility for compliance with the Historic Preservation Act to the Corps. The district court found that the Corps was entitled to rely on the DRBC's prior approval of the Point Pleasant location as "conclusive" (A19-20, A46) and that neither the Corps or the DRBC had a duty to examine alternative locations under Section 110(f) in any event (A47).

Thus, there was no action by any agency to minimize harm to the Landmark. This sanctions a total mockery

of the Congressional mandate.

Even assuming, arguendo, that the Corps was entitled to assume that the Delaware Canal could be crossed at some location, without even considering the many potential project alternatives, this did not discharge its Section 110(f) duty to adopt the least possible harmful point of crossing. Consistent with this Court's fulsome Overton Park teaching, the provision of Section 4(f) of the DOTA requiring "all possible planning to minimize harm" has been interpreted by Circuit Courts to require consideration of alternative locations within a protected area, after it has been determined that no prudent and feasible alternative exists to the encroachment on some portion of that protected area. The Fifth Circuit has stated that once the "no prudent and feasible" alternative test is met:

> The relocation of a highway through another portion of a recreational area must be considered as a means of minimizing harm to the area [citations omitted]. This requires a simple balancing process which would total the harm to the recreational area of each route and select the route which does the least harm.

Louisiana Environmental Society Inc. v. Coleman, 537 F.2d 79, 85-86 (5th Cir. 1976). Similarly, the D.C. Circuit has stated that:

> "the evaluation of harm [under Section 4(f)] requires a far more subtle calculation than merely totalling the number of acres to be asphalted. For example, the location of the affected acres in relation to the remainder of the parkland may be a more important determination, from the standpoint of harm to the park, than determining the number of affected acres.

D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1239 (D.C. Cir. 1972).

This interpretation that the less stringent "planning to minimize" language of Section 4(f) requires

implementation of locations within a protected area which must be crossed is a fortiori as to the Corps' responsibility under Section 110(f) to take maximum possible action to adopt a minimally damaging crossing site along the Delaware Canal.

The Corps' reliance on the DRBC's choice of Point Pleasant as the Canal crossing site fails for two reasons. First, the DRBC never conducted a review of Canal crossing sites under the standards imposed by Section 110(f), because the statute was not enacted until several month after the DRBC's update review was completed.[12/] Moreover, the DRBC, acknowledging its inability to

12/ DRBC's Environmental Impact Statement selecting Point Pleasant was completed in 1973, before the Canal was made a Landmark; its update Assessment was issued in August, 1980, before enactment of Section 110(f).

conduct an adequate review under the National Historic Preservation Act, specifically delegated that duty to the Corps (Finding of Fact 90, A95). Hence, because the Corps refused to examine or select Canal crossing sites outside Point Pleasant which would minimize harm as required by Section 110(f), compliance was never made at all by anyone.[13/]

Permitting the maiming of the Delaware Canal without an effort to minimize the intrusion directly flouts the Congressional mandate. Where a statutory requirement exists under standards and for the purposes imposed by that statute, compliance is not presumed by virtue of the fact that some consideration may have taken place under other

13/ Plaintiffs' proffer of witnesses to testify that the Corps recital of compliance with Section 110(f) was mere paper compliance" was not accepted by the District Court.

standards. As Justice Frankfurter once stated: "in administrative law we are dealing preeminently with law in the making; with fluid tendencies and tenative traditions:, Frankfurter, "The Task of Administrative Law", 75 U.Pa.L.Rev. 614, 619 (1927).

This Court has found it necessary to remand a decision to an administrative agency for reconsideration in light of a new agency circular promulgated by that very agency subsequent to the original action taken, noting that, "the legal effect of the circular, the extent to which it binds local. . . authorities, and whether it is in fact applicable to the petitioner are questions we do not now decide". Thorpe v. Housing Authority of Durham, 386 U.S. 670, 673, n.4 (1966). See also, Soric v. Immigration and Naturalization Service, 382 U.S. 285 (1965) (remand to

Immigration and Naturalization Service for reconsideration of denail of alien's application in light of intervening amendments to that Act); Roe v. Norton, 422 U.S. 391 (1974) (remand of dispute as to whether state welfare statute conflicts with Social Security Act for reconsideration in light of amendments to the federal Act). The Circuit Courts have also required this. As the Ninth Circuit stated:

> [A] court reviewing the Secretary's 4(f) decision must satisfy itself that the Secretary evaluated the . . . project with the mandates of Section 4(f) clearly in mind [cite omitted]. On the administrative record, the Secretary's consistent position was not that he had complied with Section 4(f) but that the statute was altogether inapplicable. In light of that consistently recorded position, it is not possible, with factual accuracy, to conclude that the Secretary evaluated [the project] with the explicit directives of 4(f) firmly in mind.

Stop H-3 Association v. Coleman, 533 F.2d 434, 445 (9th Cir. 1976), cert den., sub

nom Wright v. Stop H-3 Association, 429 U.S. 999. See also, Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F.Supp. 918 (M.D. Pa. 1971) (remand to agency for new 4(f) determination after Overton Park where the D.O.T. Secretary could not have "anticipate[d] the new light" cast on Section 4(f) decisionmaking by that Supreme Court ruling).

DRBC's consideration of crossing sites, made before the passage of Section 110(f), under different standards and for different purposes, could not fulfill the Section 110(f) mandate.

The Corps argued not only that it was entitled to rely on the DRBC's consideration of alternatives but that it was bound by DRBC's selection of the Point Pleasant location by virtue of a unilateral provision added by Congress in adopting and consenting to the Compact

which states that whenever the DRBC has made an addition to its comprehensive plan (such as the addition of this water diversion project) the exercise of powers by any federal agency "shall not substantially conflict" with such addition. Delaware River Basin Compact, 87-328, 72 Stat. 688, §15.1(s) (1961).

The short answer is that whatever the effect of this provision on the Corps might have been if the DRBC had in fact made a review here, the DRBC did not do so but in fact specifically delegated NHPA compliance to the Corps. The Corps is not entitled to act in derogation of Section 110(f)'s requirements because of a feared conflict with a DRBC decision.

More broadly, Section 15.1(s) of the Compact merely state that projects should not contradict DRBC's approvals. It does not state that DRBC approval is a

binding mandate that the project actually be brought into existence. Hence, an independant exercise of jurisdiction which results in disapproval of a component of the plan, for reasons not considered by the DRBC in its approval, is not an action which "substantially conflicts" with a DRBC plan. In any event, there is no indication that Congress intended, by its addition of Section 15.1(s) as a unilateral Congressional enactment in approving the DRBC Compact, to limit its own later enactment of federal law. This case is thus unlike Texas v. New Mexico, ___ U.S. ___, 103 S.Ct. 2558 (1983) in which this Court ruled that where Congress has given approval to an Interstate Compact a court may not alter the terms of that Compact though an exercise of its equity jurisdiction. (Id, at 2565. Hence, the Corps' assumption of a Point Pleasant

location and its refusal even to undertake a Section 110(f) review to determine whether other Canal crossing sites would minimize harm to the environment, is specious.

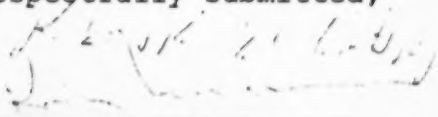
Section 110(f) was enacted to require more stringent care for Landmarks than was occurring under Section 106 of the NHPA, 16 U.S.C. §470(f) which required consultation for all National Register sites. It is ironic that this Landmark got less care. There is urgent need to insure that agencies comply with the Congressional mandate of Section 110(f), as there was in 1971, with regard to Section 4(f). Our Nation's Historical Landmarks are rare and irreplaceable, and Congress' specific commands should be fulsomely honored, not sloughed aside.

CONCLUSION

For the foregoing reasons,

petitioners respectfully request that a writ of centiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,



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Dated: October 31, 1983
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APPENDIX TO BRIEF

National Environmental Policy Act, 42 U.S.C. 4332:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall-

X X X

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the qualify of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action.

(ii) any adverse environmental effects which cannot be avoided should the proosal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the

proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statements and the comments and view of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

X X X

(E) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

National Historic Preservation Act, 16 U.S.C. §470H-2(f):

(f) Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

Administrative Procedures Act, 5 U.S.C. §706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limintations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by reviewing court

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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